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No. 99-1185

IN THE
Supreme Court of the United States

MARK SELING, Superintendent
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF KANSAS AND THE *AMICI* STATES IN SUPPORT OF WASHINGTON

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QUESTION PRESENTED

Whether a civil commitment statute that is constitutional on its face can violate double jeopardy or *ex post facto* prohibitions "as applied" to a particular individual?

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INTERESTS OF THE *AMICI CURIAE*

Kansas and the Amici States submit this brief in support of petitioner, the State of Washington, and respectfully request that this Court reverse the erroneous decision of the Ninth Circuit holding that respondent may assert "as applied" double jeopardy and *ex post facto* challenges to the Washington Sexually Violent Predator Act. Pet. App. 1a - 13a.

Kansas and many other *Amici* States have virtually identical statutes that permit, pursuant to strict procedural requirements, the civil commitment of certain sexually violent predators. In a direct facial challenge to the Kansas Sexually Violent Predator Act—which was modeled directly on the Washington statute at issue in this case—this Court held that such laws do not violate either the double jeopardy or *ex post facto* prohibitions of the United States Constitution. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

In part as a result of this Court's ruling in *Kansas v. Hendricks*, fourteen states in addition to Kansas and Washington currently have a sexually violent predator act.[1] These sixteen states, and those that anticipate such legislation, therefore have a shared interest in preserving the integrity of these laws. Moreover, the Ninth Circuit's decision permitting resort to federal *habeas corpus* as a way to challenge treatment programs and conditions of confinement logically could be extended to *any* civil commitment statute. Such a result would

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[1] Those states are: Arizona (Ariz. Rev. Stat. §§ 36-3701 - 36-3716), California (Cal. Welf. & Inst. Code § 6600), Florida (Fla. Stat. Ann. §§ 394.910 - 394.931), Illinois (725 Ill. Comp. Stat. Ann. 207), Iowa (Iowa Code § 229A), Massachusetts (M.G.L. ch. 6, §§ 178C - 178P), Minnesota (Minn. Stat. §§ 253B.185 & 253B.02, subds. 18b & 18c), Missouri (Mo. Rev. Stat. § 632.480), New Jersey (N.J. Rev. Stat. § 30:4-27.26), North Dakota (N.D. Cent. Code § 25-03.3), South Carolina (S.C. Code Ann. § 44-48-10), Texas (Tex. Health & Safety Code Ann. § 841), Virginia (§§ 37.1-70.1, *et seq.*, Code of Virginia (1950) *as amended*), and Wisconsin (Wis. Stat. ch. 980).

directly and significantly impact all fifty states, as well as the federal courts.

SUMMARY OF ARGUMENT

The Ninth Circuit erroneously refused to follow this Court's decision in *Kansas v. Hendricks*, 521 U.S. 346, which expressly rejected double jeopardy and *ex post facto* challenges to a sexually violent predator act indistinguishable from the Washington statute at issue in this case. Although recognizing that "*Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses," Pet. App. 7a, the Ninth Circuit erroneously and improvidently created a novel "as applied" double jeopardy and *ex post facto* analysis. *See id.* (opining that "*Hendricks* does not preclude the possibility that the Washington statute, as applied, is punitive").

The Ninth Circuit's decision ignores and/or misapprehends this Court's two-step "punishment" analysis for double jeopardy and *ex post facto* claims. The "threshold question," *Hudson v. United States*, 522 U.S. 93, 101 (1997), whether the Washington statute actually imposes "criminal punishment"—which the Ninth Circuit passed over—is critical to the respondent's challenges in this case. Indeed, the Court made clear in *Hendricks* that"[o]ur conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims." 521 U.S. at 369.

In this context, the Court has made clear that, when a law purports to be civil on its face, a presumption arises that the statute is civil and thus not punitive. *See Kansas v. Hendricks*, 521 U.S. at 361. That presumption can be overcome *only if* the challenging party demonstrates "by the clearest proof" that the statutory scheme is "so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. at

99-100 (internal citations omitted). To that end, the factors enunciated in *Kennedy v. Mendoza -Martinez*, 372 U.S. 144, 168-69 (1963), "provide useful guideposts." *Hudson*, 522 U.S. at 99. However, in *Hudson v. United States* the Court emphasized that the *Kennedy* factors "'must be considered in relation to the statute on its face.'" *Hudson*, 522 U.S. at 100 (quoting *Kennedy v. Mendoza -Martinez*, 372 U.S. at 169).

Thus, the Ninth Circuit's first error was to skip the "threshold question" whether the Washington statute imposes "criminal punishment" and to ignore the Court's explicit instruction in *Hudson* that a statute's "effect"—for purposes of making that threshold determination—is to be considered in relation to the statute *on its face*. *Hudson*, 522 U.S. at 100. Moreover, *Kansas v. Hendricks*, 521 U.S. 346, upholding a virtually identical statute against double jeopardy and *ex post facto* challenges, is to the same effect as *Hudson* on this determinative point. In essence, the Ninth Circuit's decision in this case resurrects the approach of *United States v. Halper*, 490 U.S. 435 (1989), which this Court expressly overruled in *Hudson v. United States*, 522 U.S. at 101 (footnote omitted) ("We believe that *Halper*'s deviation from longstanding double jeopardy principles was ill-considered").

The Ninth Circuit's second error was to misapprehend the Court's passing references in *Kansas v. Hendricks* to the alleged actual conditions of Hendricks' commitment and the treatment he was receiving. Contrary to the Ninth Circuit's decision, the Court did not in *Hendricks* "turn repeatedly to the question whether the conditions of Hendricks' confinement rendered the Kansas statute punitive," Pet. App. 7a, nor does *Hendricks* "dictate[] . . . [that courts] look to the conditions of . . . confinement when" evaluating double jeopardy and *ex post facto* claims. *Id.* Rather, although Hendricks himself repeatedly had attempted to transform his challenge to the Kansas statute into a *habeas*-like proceeding, this Court limited its analysis to consideration of the statute on its face in accord

with the two-step approach articulated in *Hudson* and numerous other cases. *See* 521 U.S. at 361-67 (discussing at length various provisions of the Kansas Sexually Violent Predator Act *itself*, the Act's legislative history, and the Kansas Supreme Court's decision below, in assessing whether there was the "clearest proof" that the Act was actually punitive or criminal in effect).

Only in the penultimate paragraph of its analysis in *Hendricks* did the Court mention the Attorney General's representation at oral argument that Hendricks was receiving treatment. 521 U.S. at 368. And, only in a footnote at that point did the Court even mention the state *habeas* proceeding Hendricks had filed while the appeal of his commitment was pending. *Id.* at 368 n.5. Thus, *nothing* in the Court's opinion in *Kansas v. Hendricks* suggests, much less "dictates", that federal courts should conduct evidentiary hearings on federal *habeas corpus* applications to determine whether a civil commitment statute—admittedly constitutional on its face—violates constitutional double jeopardy and *ex post facto* prohibitions "as applied."

Finally, even were respondent not receiving appropriate treatment under Washington's program, the only potentially proper federal remedy would be a section 1983 suit seeking to enforce compliance with constitutional requirements. The Court repeatedly has made clear that the *habeas corpus* statute, 28 U.S.C. § 2254, and 42 U.S.C. § 1983 operate in different spheres. *Preiser v. Rodriguez*, 411 U.S. 475, 484-86 (1973); *Heck v. Humphrey*, 512 U.S. 477, 487 (1994); *Edwards v. Balisok*, 520 U.S. 641, 648 (1997). These two federal statutes are not "fungible remedies for constitutional violations." *Allen v. McCurry*, 449 U.S. 90, 104 n.24 (1980). If there is a problem with respondent's treatment, his potential federal redress is a section 1983 suit seeking correction of constitutional deficiencies in the Washington program, not release from custody under section 2254.

For these reasons, the Ninth Circuit's decision should be reversed.

ARGUMENT

I. THIS COURT'S DECISIONS IN *KANSAS v. HENDRICKS*, 521 U.S. 346 (1997), AND *HUDSON v. UNITED STATES*, 522 U.S. 93 (1997), MAKE CLEAR THAT THERE CAN BE NO "AS APPLIED" DOUBLE JEOPARDY AND *EX POST FACTO* CHALLENGES TO FACIALLY VALID CIVIL COMMITMENT STATUTES

The Ninth Circuit erred in at least two critical respects. First, the Ninth Circuit's decision ignores and/or misapprehends this Court's two-step "punishment" analysis for double jeopardy and *ex post facto* claims. The "threshold question," *Hudson v. United States*, 522 U.S. at 101, whether the Washington statute actually imposes "criminal punishment"—which the Ninth Circuit passed over—is critical to the respondent's challenges in this case. Indeed, the Court made clear in *Hendricks* that"[o]ur conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims." 521 U.S. at 369.

Second, the Ninth Circuit erred by not recognizing that the threshold "criminal punishment" analysis is limited to an assessment of the relevant statute "'on its face.'" *Hudson v. United States*, 522 U.S. at 100 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963)). In a related vein, the Ninth Circuit also erred in reading this Court's decision in *Kansas v. Hendricks* to "dictate" that courts look to the actual conditions of confinement in assessing whether a facially valid civil commitment statute is nonetheless criminal punishment "as applied." Pet. App. 7a. This Court's decision in *Hendricks* did not employ such an approach, which is logically inconsistent with the double jeopardy/*ex post facto* analytical framework

the Court applied in *Hendricks* and reiterated in *Hudson* (while expressly overruling *United States v. Halper*, 490 U.S. 435, which the Ninth Circuit effectively attempted to resurrect in this case).

A. Double Jeopardy And *Ex Post Facto* Challenges To A Purportedly Civil Statute Must Be Evaluated By Considering The Statute On Its Face

In *Kansas v. Hendricks*, 521 U.S. 346, and *Hudson v. United States*, 522 U.S. 93, this Court clearly articulated the proper analysis to determine whether a purportedly civil law implicates constitutional double jeopardy or *ex post facto* prohibitions. In *Hendricks*, the Court stated the basic analytical framework as follows:

> The categorization of a particular proceeding as civil or criminal "is first of all a question of statutory construction." We must initially ascertain whether the legislature meant the statute to establish "civil" proceedings. If so, we ordinarily defer to the legislature's stated intent. * * * Although we recognize that a "civil label is not always dispositive," we will reject the legislature's manifest intent only where a party challenging the statute provides the "clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil."

521 U.S. at 361 (internal citations omitted). Likewise, in *Hudson*, the Court articulated the analysis as follows:

> Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in

> purpose or effect" as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty." In making this latter determination, the factors listed in *Kennedy v. Mendoza-Martinez* provide useful guideposts . . . . It is important to note, however, that "these factors must be considered in relation to the statute on its face," and "only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

522 U.S. at 99-100 (internal citations omitted).

The Court in *Hudson* then went on to disavow the analysis it applied in *United States v. Halper*, 490 U.S. 435, observing that

> [t]he analysis applied by the *Halper* Court deviated from our traditional double jeopardy doctrine in two key respects. First, the *Halper* Court bypassed the threshold question: whether the successive punishment at issue is a "criminal" punishment. * * * The second significant departure in *Halper* was the Court's decision to "asses[s] the character of the actual sanctions imposed," rather than, as *Kennedy* demanded, evaluating the "statute on its face" to determine whether it provided for what amounted to a criminal sanction.

522 U.S. at 101 (internal citations omitted). The Ninth Circuit's decision in this case is effectively an attempt to resurrect the discarded *Halper* double jeopardy analysis.

It is clear that, initially, a court must inquire whether the legislature, when enacting a particular law, purported to create either a civil or a criminal statute. *Hudson v. United States*, 522 U.S. at 99. If the law purports to be civil on its face, a presumption arises that the statute is civil. *Kansas v. Hendricks* 521 U.S. at 361. That presumption can be overcome only if the challenging party demonstrates "by the clearest proof" that the statutory scheme is "so punitive either

in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Hudson*, 522 U.S. at 99-100 (internal citations omitted).

In assessing whether the "clearest proof" exists, the factors enunciated in *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69,[2] "provide useful guideposts." *Hudson*, 522 U.S. at 99. However, this Court has made it perfectly clear that the *Kennedy* factors "must be considered in relation to the statute on its face." *Hudson*, 522 U.S. at 100; *id.* at 101. It is from this latter, and highly significant, principle that the Ninth Circuit departed.

Given the concerns over a "wide variety of novel double jeopardy claims" that arose following the Court's decision in *United States v. Halper*, 490 U.S. 435, the Court revisited and ultimately rejected the *Halper* analysis in *Hudson v. United States*, 522 U.S. 93. Indeed, the Court expressly rejected *United States v. Halper* as "ill-considered" and "unworkable." *Hudson*, 522 U.S. at 101-02. In finding that the *Halper* decision had improperly "elevated" a single *Kennedy* factor, the Court reaffirmed the import of the *Kennedy* decision that no one factor should be considered controlling. 522 U.S. at 101.

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[2] The *Kennedy v. Mendoza-Martinez*, factors are as follows:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [all of which are] relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute *on its face*.

372 U.S. at 168-69. (footnotes omitted) (emphasis added).

Perhaps most importantly for this case, however, was the Court's conclusion that *Halper* had erroneously, and contrary to the command of *Kennedy*, "assessed the character of the actual sanctions imposed." *Id.* at 101-02. In this case, the Ninth Circuit effectively ignored the Court's rejection of *Halper* and indeed attempted to resurrect the *Halper* approach.

In short, this Court has unequivocally announced that for double jeopardy and *ex post facto* purposes, consideration of a statute's "effect" in making the threshold "criminal punishment" determination is limited to an analysis of the statute on its face. *Id.* at 100. An "as applied" approach, as utilized by the Ninth Circuit in this case, simply does not exist under this Court's precedents and is unworkable, as the Court explained when it overruled *Halper*.

Thus, in holding that the conditions of respondent's confinement may render Washington's commitment statute punitive as applied to respondent, the Ninth Circuit resurrected a previously rejected, ill-advised and unworkable constitutional challenge: an "as applied" double jeopardy/*ex post facto* claim.[3] The Ninth Circuit's approach in this case flies in the face of this Court's recent, well-established precedents and, if permitted to stand, will render meaningless the Court's requirement that such challenges be considered "in relation to the statute on its face." *Hudson*, 522 U.S. at 100. Indeed, the Ninth Circuit's decision fundamentally misapprehends the nature of the constitutional double jeopardy and *ex post facto* prohibitions and constitutes a marked detour from this Court's recent cases.

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[3] This Court made clear in *Kansas v. Hendricks* that, at least in the civil commitment context, double jeopardy and *ex post facto* claims are congruent. In particular, the Court held "that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive. Our conclusion that the Act is nonpunitive thus removes an *essential prerequisite* for *both Hendricks*' double jeopardy and *ex post facto* claims." 521 U.S. at 369 (emphasis added).

B. In *Kansas v. Hendricks*, 521 U.S. 346 (1997), This Court Limited Its Evaluation Of The Double Jeopardy And *Ex Post Facto* Challenges To The Kansas Statute On Its Face

The Ninth Circuit relies primarily on the Court's decision in *Kansas v. Hendricks* for the position that an "as applied" analysis is appropriate for double jeopardy and *ex post facto* purposes. In an attempt to justify its novel and improvident analysis, the Ninth Circuit opined (incorrectly) that the Court in *Hendricks* "turn[ed] repeatedly to the question whether the conditions of Hendricks' confinement rendered the Kansas statute punitive." Pet. App. 7a. The Ninth Circuit failed in this respect to read the *Hendricks* opinion carefully and to appreciate the context in which this Court made passing reference to Hendricks' conditions of confinement.

In *Kansas v. Hendricks*, the Court began its analysis of the "punishment" issue by noting that "[w]e granted Hendricks' cross-petition to determine whether the Act violates the Constitution's double jeopardy prohibition or its ban on *ex post facto* lawmaking." 521 U.S. at 360-61. The Court explained that the "thrust of Hendricks' argument is that the Act establishes criminal proceedings; hence confinement under it necessarily constitutes punishment." *Id.* at 361. In rejecting that argument, the Court began its analysis by observing that the determination whether "a particular proceeding is civil or criminal 'is first of all a question of statutory construction.'" *Id.* (quoting *Allen v. Illinois*, 478 U.S. 364, 368 (1986)). After observing that "nothing on the face of the [Kansas] statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm," 521 U.S. at 361, the Court emphasized that the key issue is whether "'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

The Court then proceeded to analyze the Kansas statute with repeated reference to the statute's purpose and the Kansas Legislature's intent, as derived from the provisions of the statute itself. 521 U.S. at 361-67. In so doing, the Court discussed the purposes of the statute, *id.* at 361-63, the nature and length of Hendricks' potential detention under the statute, *id.* at 363-64, the procedural safeguards included in the statute, *id.* at 364-65, and the statute's requirement of treatment. *Id.* at 365-67. Only in the penultimate paragraph of this section of the opinion did the Court even mention the actual conditions of Hendricks' confinement or the treatment program. And the Court's passing references are in essence an aside indicating that the implementation of the statute was consistent with the facial analysis.[4] The Court made no suggestion that the implementation actually affected the double jeopardy and *ex post facto* analysis.[5]

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[4] While his appeal of his commitment was pending in state court, Hendricks had filed a state *habeas* proceeding, arguing that he should be released from the sexually violent predator program because he was not receiving adequate treatment. He lost in that proceeding and then attempted to make that proceeding part of the record in his appeal of the commitment decision in the Supreme Court of Kansas. After that court denied his request to make that proceeding part of the record on appeal, Hendricks continued to attempt to use testimony from that proceeding in his appeal to this Court. Thus, although the Court referred in passing to the facts developed in the state *habeas* proceeding, it is clear that those proceedings were not part of the official record before this Court when it decided *Kansas v. Hendricks*. *See* 521 U.S. 346, 368 n.5; *id.* at 392 (Breyer, J., dissenting) ("The [state *habeas*] proceeding is thus not part of the record, and cannot properly be considered by this Court.").

[5] Indeed, the Court held the Kansas law to be a civil commitment scheme not subject to double jeopardy and *ex post facto* facial challenges even though the treatment program in Kansas was not fully implemented when Hendricks was committed under the statute. *Kansas v. Hendricks*, 521 U.S. at 367-68 ("Although the treatment program initially offered Hendricks may have seemed somewhat meager, it must be remembered that he was the first person committed under the Act"); *see also*

Thus, although the Court mentioned—in a very general way—the conditions under which Hendricks was confined and the treatment he was receiving, the Court's focus was a facial analysis of the Kansas statute. The Kansas Legislature's intent was the overriding concern. *Hendricks*, 521 U.S. at 362-369. In particular, the Court maintained that the "effect" of the statutory scheme is reviewed simply to determine whether a rejection of the "legislature's manifest *intent*" to deem a law civil is warranted. *Id.* at 361 (emphasis added). The only inquiry for double jeopardy and *ex post facto* purposes, therefore, in accordance with both *Hendricks* and *Hudson*, is whether Washington's Sexually Violent Predator law *on its face* is so punitive in purpose or effect that it must be considered "punishment" for constitutional purposes.

For all practical purposes the Ninth Circuit has carved out an exception to the proper facial analysis of a statute by attributing meaning to *Hendricks* that is simply not there. Contrary to the Ninth Circuit's assertion in this case, *Hendricks* did not leave open the possibility of an "as applied" approach. Quite the opposite. *Hendricks* clearly disposes of the issue, given that the only reasonable interpretation is that conditions of confinement were addressed in passing and solely within the context of evaluating legislative intent. Consequently, there is no support in this Court's precedents for an "as applied" approach to double jeopardy and *ex post facto* challenges to a statute.

Youngberg v. Romeo, 457 U.S. 307, 317 (1982) (wide latitude for treatment regimes). Even Justice Breyer who, in dissent, would have found the Kansas law punitive, argued that the Kansas statute was distinguishable from any other state statute, including the Washington law at issue in this case. *Kansas v. Hendricks*, 521 U.S. at 388-89 (Breyer, J., dissenting).

II. *HABEAS CORPUS* RELIEF IS NOT PROPER IN THIS CONTEXT

Equally flawed was the Ninth Circuit's decision to address respondent's claims under the *habeas corpus* statute, 28 U.S.C. § 2254. Because respondent's claims only challenge the conditions of his confinement and his treatment program, the appropriate federal vehicle—if any—for respondent's claims is a suit under 42 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. at 484-86; *Heck v. Humphrey*, 512 U.S. at 487; *Edwards v. Balisok*, 520 U.S. at 648. Respondent's claims in this case do not undermine the validity of his initial commitment nor the procedures used (this Court's decision in *Kansas v. Hendricks* largely having precluded such challenges). Federal *habeas* actions and section 1983 suits are not "fungible remedies for constitutional violations." *Allen v. McCurry*, 449 U.S. 90, 104 n.24. Thus, whatever federal avenue may be available for respondent to raise his challenges to the conditions of his confinement and his treatment program, it is not a *habeas corpus* suit under 28 U.S.C. § 2254.

Respondent has the opportunity to demonstrate in a section 1983 suit that his treatment is constitutionally deficient.[6] In *Heck v. Humphrey*, this Court sought to harmonize the more "general" section 1983 with the more "specific" federal *habeas corpus* statute. *Heck* held that a prisoner may not bring a section 1983 action seeking damages for "actions whose unlawfulness would render a conviction or sentence invalid" without first establishing the invalidity of that conviction or sentence under habeas. 512 U.S. at 486-87 (footnote omitted).

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[6] It is the Fourteenth Amendment's guarantee of due process, not constitutional double jeopardy and *ex post facto* prohibitions, that governs the rights of a civilly committed individual to "constitutionally required conditions of confinement." *Youngberg v. Romeo*, 457 U.S. at 315; *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Jones v. United States*, 463 U.S. 354, 383 (1983).

Thus, persons who challenge the validity of their underlying conviction or the duration of their confinement must pursue the exclusive and specific remedy of a writ of *habeas corpus*. *Bressman v. Farrier*, 498 U.S. 1126, 1127 (1991); *Preiser v. Rodriguez*, 411 U.S. 475, 489-90.

But the converse is also true. Persons that challenge only the conditions of their confinement, but not the fact or duration of their confinement, cannot obtain *habeas corpus* relief, *i.e.*, release from custody. When an individual does not challenge the underlying commitment, but instead only the conditions of his civil confinement, the appropriate federal method for considering constitutional claims is under section 1983, not *habeas corpus*. Thus, in this case, respondent's "remedy for these alleged unconstitutional conditions is not a release from confinement." *In re Detention of Turay*, 986 P.2d 790, 812, *as amended in denial of reh'g* (Wash. 1999).

The appropriate remedy in this case, if a remedy is constitutionally required, is to correct or remove the offending condition rather than release respondent. Respondent does not attack his underlying commitment and presumably would lack any basis to challenge his confinement if the alleged "punitive" conditions were removed or modified to comport with constitutional requirements. Because a judgment "in [respondent's] favor would not demonstrate the invalidity of his confinement," his claims are outside the scope of *habeas corpus*. *Heck v. Humphrey*, 512 U.S. at 499 n.4 (Souter, J., concurring).

Although respondent may well desire release from confinement–the essence of *habeas corpus*, *see Preiser v. Rodriguez*, 411 U.S. at 484–his claims clearly relate only to Washington's allegedly unconstitutional treatment program and conditions of confinement. Consequently, his claims are not properly cognizable under federal *habeas corpus*. To hold otherwise would be to expand federal *habeas corpus* beyond its intended scope. *Cf. Heck v. Humphrey*, 512 U.S. at 491

(Thomas, J., concurring). Thus, any challenge to the implementation of the facially valid Washington statute must be brought as an action seeking to compel the State to comply with constitutional treatment requirements. Questions regarding the nature of the Washington treatment program do not form a legal basis for seeking to declare the law unconstitutional.[7]

Thus, if respondent's treatment program is inadequate, his potential federal remedy is to file a section 1983 suit seeking to compel compliance with any federal constitutional requirements. It does not follow that concerns or questions about a predator's treatment conditions or program must lead to his release. A remedy of that sort is far too broad and disproportionate to the nature of the claim. In appropriate cases, 42 U.S.C. § 1983 may provide the necessary federal vehicle for someone such as respondent to raise inadequate treatment or improper condition claims.

Moreover, such challenges may be made not only by sexual predators but by *any* person who has been involuntarily confined through some sort of civil process.[8] Once *habeas corpus* relief—release from custody—is divorced from the context in which it is appropriate, there will be any number of

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[7] Like the Kansas statute upheld in *Hendricks*, the Washington law expressly requires and emphasizes that "any person committed pursuant to this chapter has the right to adequate care and individualized treatment." Wash. Rev. Code § 71.09.080(2). Pet. App. 122a.

[8] *See, e.g., In re: Indefinite Detention Cases*, No. CV 98-674 TJH(JWJX), 2000 WL 95306, at *3-4 (C.D. Cal. Jan. 27, 2000) (addressing, in the deportation context, the constitutional involuntary commitment principles discussed in *Foucha v. Louisiana*, 504 U.S. 71 (1992)). Given the Ninth Circuit's expansive use of federal *habeas corpus* in this case, it is reasonable to conclude that those subject to deportation may look to federal *habeas corpus* in an effort to seek release from custody pending repatriation, even though their only complaints may concern their conditions of confinement.

persons who may seek to invoke *habeas corpus* as a remedy against allegedly improper *conditions* of confinement. Ultimately, the impropriety of *habeas corpus* relief to remedy allegedly improper conditions of confinement further demonstrates that the Ninth Circuit's "as applied" theory of double jeopardy and *ex post facto* challenges does not pass muster.

CONCLUSION

This Court should reverse the Ninth Circuit's decision.

Respectfully submitted,

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